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THE NEIGHBORHOOD SCHOOL TRANSPORTATION RELIEF ACT—S. 1647

REPORT

TOGETHER WITH

MINORITY VIEWS

TO THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

AUGUST —, 1983

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LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., April 8, 1983.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
Dirksen Senate Office Building,
Washington, D.C.

DEAR STROM: This is to inform you that the Subcommittee on Separation of Powers has completed its work on court-ordered school busing and has prepared a report of its findings to the full committee. In accordance with Mr. Lide's directive of August 2, 1982, I am sending you this letter of transmittal so that the report may be printed.

Thanking you for your attention to this matter, I am

Sincerely yours,

JOHN P. EAST,
U.S. Senator.

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THE NEIGHBORHOOD SCHOOL TRANSPORTATION RELIEF ACT—S. 1647

The Subcommittee on Separation of Powers, to which the Committee on the Judiciary referred the bill, S. 1647, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. THE TEXT OF S. 1647

A BILL To insure equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [That this Act may be cited as the "Neighborhood School Transportation Relief Act of 1981".

[STATEMENT OF FINDINGS AND PURPOSES

[SEC. 2. (a) The Congress enacts the provisions of this Act pursuant to its authority under section 1 of article III of the Constitution of the United States and under section 5 of the fourteenth amendment to the Constitution of the United States.

[(b) The Congress finds that the assignment and transportation of students to elementary and secondary public schools on the basis of race, color, or national origin—

[(1) leads to greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools;

[(2) fails to accounts for the social science data indicating that racial and ethnic imbalance in the public elementary and secondary schools is often the result of economic and sociologic factors rather than past discrimination by public officials;

[(3) is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation;

[(4) causes significant educational, familial, and social dislocations without commensurate benefits;

[(5) undermines community support for public education;

[(6) is disruptive of social peace and racial harmony;

[(7) has not produced an improved quality of education;

[(8) debilitates and disrupts the public educational system and wastes public funds and other resources;

[(9) unreasonably burdens individuals who are not responsible for the wrongs such assignment and transportation are purported to remedy;

[(10) infringes the right to racially and ethnically neutral treatment in school assignment; and

[(11) has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools.

[(c) The Congress further finds that the enforcement of the right to be free from intentional desegregation and discrimination in school assignments can best be enforced by denying jurisdiction of the inferior Federal courts to order the assignment or transportation of students to public elementary and secondary schools on the basis of race, color, or national origin.

[LIMITATION ON THE JURISDICTION OF INFERIOR FEDERAL COURTS WITH RESPECT TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

[SEC. 3. (a) Chapter 155 of title 28 of the United States Code (relating to the congressional power to limit the injunctive power of inferior Federal courts and relating to three-judge courts), is amended by adding before section 2283 the following new section:

["§ 2282. Jurisdiction; limitations

["(a) Notwithstanding any other provision of law, no inferior court of the United States nor any judge of any inferior court of the United States shall have jurisdiction to issue any injunction, writ, process, order, citation for or order with respect to contempt, rule, judgment, decree, or command—

["(1) requiring the assignment or transportation of any student to a public elementary or secondary school operated by a State or local education educational agency for the purpose of altering the racial or ethnic composition of the student body at any public school;

["(2) requiring any State or local educational agency to close any school and transfer the students from the closed school to any other for the purpose of altering the racial or ethnic composition of the student body at any public school; or

["(3) precluding any State or local educational agency from fulfilling any provision of any contract between it and any member of the faculty or adminstration of any public school it operates specifying the public school where the member of the faculty or administration is to perform his or her duties under the contract.

["(b)(1) For the purpose of this section the term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

["(2) For the purpose of this section the term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency; an officer or agency designated by the Governor or by State law.".

[(b) The section analysis of chapter 155 of title 28 of the United States Code is amended by inserting before the item for section 2283 the following new item:]

["§ 2282. Jurisdiction; limitation.".]

That this Act may be cited as the "Neighborhood School Transportation Relief Act of 1981".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress enacts the provisions of this Act pursuant to its authority under section 1 of article III of the Constitution of the United States and under section 5 of the fourteenth amendment to the Constitution of the United States.

(b) The Congress finds that the assignment and transportation of students to elementary and secondary public schools on the basis of race, color, or national origin—

(1) often encourages greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools;

(2) does not adequately take account of the fact that racial and ethnic imbalance in the public elementary and secondary schools is often the result of economic and social factors rather than past discrimination by public officials;

(3) is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation;

(4) causes significant educational, familial, and social dislocation without commensurate benefits;

(5) undermines community support for public education;

(6) often tends to disrupt social peace and racial harmony;

(7) consumes the study time of students and increases the risks of injury from greater length of travel to and from school;

(8) debilitates and disrupts the public educational and wastes public funds and other resources;

(9) unreasonably burdens innocent persons who are not responsible for the wrongs such assignment and transportation are purported to remedy;

(10) infringes on the right to racially and ethnically neutral treatment in school assignment; and

(11) has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools.

(c) The Congress further finds that the enforcement of the right to be free from intentional segregation and discrimination in school assignments can best be enforced by denying jurisdiction of the inferior Federal courts to order the assignment or transportation of students to public elementary and secondary schools on the basis of race, color, or national origin.

LIMITATION ON THE JURISDICTION OF INFERIOR FEDERAL COURTS WITH RESPECT TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

SEC. 3. (a) Chapter 155 of title 28 of the United States Code (relating to the congressional power to limit the injunctive power of inferior Federal courts and relating to three judge courts) is amended by adding before section 2283 the following new section:

"§ 2282. Jurisdiction; limitations

"(a) Notwithstanding any other provision of law, no inferior court of the United States nor any judge of any inferior court of the United States shall have jurisdiction to issue any injunction, writ, process, order, citation for or order with respect to contempt, rule, judgment, decree, or command—

"(1) requiring the assignment or transportation of any student to a public elementary or secondary school operated by a State or local educational agency for the purpose of altering the racial or ethnic composition of the student body at any public school, or for any other purpose;

"(2) requiring any State or local educational agency to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial or ethnic composition of the student body at any public school, or for any other purpose;

"(3) precluding any State or local educational agency from fulfilling any provision of any contract between it and any member of the faculty or administration of any public school it operates specifying the public school where the member of the faculty or administration is to perform his or her duties under the contract.

"(b)(1) For the purpose of this section the term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, country, township, school district, or other political subdivision of a State or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

"(2) For the purpose of this section the term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.".

(b) The section analysis of chapter 155 of title 28 of the United States Code is amended by inserting before the item for section 2283 the following new item:

"2282. Jurisdiction; limitations.".

AMENDMENT OF REMOVAL PROVISIONS

SEC. 4. Chapter 89 of title 28 of the United States Code (relating to district courts' removal of cases from State courts) is amended by adding after section 1455(c) the following new subsection:

"(d) A civil action in any State court including a demand for judgment for any relief described in section 2282(a) of this title may not be removed to any district court of the United States.".

SEPARABILITY

SEC. 5. If any provision of this Act or the application of any such provision to any person or circumstance is held invalid the remainder of the provisions of this Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

EFFECTIVE DATE AND RETROACTIVE APPLICATION TO EXISTING ORDERS

SEC. 6. This Act shall be effective on the date of its enactment. Upon application to the appropriate court of the United States by any State or local educational agency affected by any injunction, writ, process, order, rule, judgment, decree, or command—

(1) requiring the assignment or transportation of any student to a public elementary or secondary school operated by a State or local educational agency for the purpose of altering the racial or ethnic composition of the student body at any public school or for any other purpose; or

(2) requiring any State or local educational agency to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial or ethnic composition of the student body at any public school,

the court shall dissolve such injunction, writ, process, order, rule, judgment, decree, or command to be effective, at a time which the court determines will cause the least interruption in the orderly activities of the public elementary or secondary schools involved, but in no event later than one year after the date of the application of the petition made under this section.

II. PURPOSE OF THE LEGISLATION

The purpose of S. 1647 is to provide for the equal protection of the laws by withdrawing from lower federal courts the jurisdiction to order that students be transported to public schools according to their race, color, or national origin.

III. THE CONSTITUTIONALITY OF S. 1647

The intention of the Framers of Article III of the Constitution, the legislation of Congress beginning with its first session in 1789, and the consistent line of authority found in the decisions of the Supreme Court all clearly demonstrate that Congress has the constitutional power to regulate the jurisdiction of the inferior federal courts. As Professor Paul Bator of the Harvard Law School stated in testimony before the Subcommittee on the Constitution:

> The Constitution contains many things which are not at all clear. It does contain a few that are clear. One of the clearest is the power of Congress to regulate the jurisdiction of federal "Tribunals inferior to the Supreme Court." [1]

Article III Section 1 was drafted as a compromise between those Framers who believed that the federal judiciary should be limited to a national supreme court and those who argued that the Constitution should require inferior federal courts as well as a supreme court.[2] As a result of the compromise, the decision to establish federal courts other than a supreme court was left to the discretion of

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[1] Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 39 (1981) (statement of Paul M. Bator, Professor of Law, Harvard Law School).

[2] *Id.*, pp. 39–40. Article III Section 1, in pertinent part, is as follows: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Congress. The power to determine the jurisdiction of such courts as Congress may create was also left to Congress.

> The essence of that compromise was an agreement that the question of access to the lower federal courts as a way of assuring the effectiveness of federal law should not be constituted a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment, to be made from time to time in the light of particular circumstances.
>
> The whole point of the compromise was the insight that the question whether a given "federal" case should initiate in a state court (subject to Supreme Court review), or in a lower federal court, is not an appropriate question for decision at the constitutional level, that Congress is the body best suited to make this institutional judgment on the basis of changing circumstances.[3]

The first Congress, including in its ranks many of the men who authored the Constitution two years before, also held this interpretation of Article III. In one of its first major acts of legislation, the Judiciary Act of 1789, Congress created a system of lower federal courts, but Congress did not invest them with the full judicial power or jurisdiction defined in Article III.[4]

Indeed, until 1875 even the power to decide "federal questions," questions of law arising under the Constitutions, the laws, and the treaties of the United States, was left in the state courts, subject to review by the Supreme Court.[5] To this day, Congress has not endowed the federal judiciary with all constitutionally permissible jurisdiction.

Though a few justices on the early panels of the Supreme Court expressed different opinions on the issue of the power of Congress to regulate the jurisdiction of the federal courts,[6] the Supreme Court, in decisions since 1845, has clearly recognized this power to grant, to withold, and to withdraw jurisdiction from the courts which Congress creates. In *Cary* v. *Curtis* the Court stated the doctrine which it has repeated in subsequent opinions:

> Second, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may

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[3] *Id.*, pp. 40–41.

[4] Article III Section 2, in pertinent part, is as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

[5] Charles Alan Wright, Handbook of the Law of Federal Courts 63 (3d ed., 1976).

[6] *Id.*, p. 28. Wright cites Justice Chase in *Turner* v. *The President, Directors, and Company of the Bank of North America*, 4 Dall. (4 U.S.) 8 (1799), and Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816). See generally, Wright, pp. 24–29.

> seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.[7]

S. 1647 withdraws from the federal courts the jurisdiction to order the busing of school children to public schools on the basis of race, color, and national origin. There is ample authority in this century to support such legislation. Professor Lino Graglia points out that the Supreme Court has upheld the withdrawal of the power to enjoin enforcement of a particular federal act (*Lockerty* v. *Phillips, supra,* the Emergency Price Control Act), the withdrawal of jurisdiction to consider constitutional challenges to regulations issued under the same Emergency Price Control Act even when the challenge is made as a defense to criminal charges being prosecuted in federal courts (*Yakus* v. *United States, supra*), and the withdrawal of the power to issue injunctions in labor disputes (*Lauf* v. *E. G. Shinner and Co., supra,* the Norris-LaGuardia Act).[8]

In contrast to the legislation upheld in the *Yakus* case, S. 1647 does not withdraw from the federal courts the jurisdiction to hear and decide the merits of cases alleging discrimination on the basis of race in the public schools: the Act only withdraws one of the several remedies available to the federal court upon its finding of unconstitutional discrimination—the forced busing of children on the basis of race, color, or national origin. The Subcommittee emphasizes that S. 1647 is directed only toward the jurisdiction of the federal courts to utilize a particular remedy.

The rights created by the Constitution and by Federal statutes are not and never have been within the exclusive preserve of the Federal courts. Jurisdiction over the cases and controversies defined in Article III Section 2 (with those exceptions set forth in Clause 2 of the section) is and has always been shared by the state and federal courts unless Congress, "either expressly or by fair implication," chooses to make the jurisdiction exclusive.[9] S. 1647 represents the judgment of Congress that the appropriateness of forced busing as a remedy to racial discrimination in the public schools is a determination better left to the state courts than to the federal courts. The Act says nothing about the jurisdiction of the state courts.

The Subcommittee also concludes that the withdrawal of jurisdiction effected by S. 1647 does not violate any provision of the Constitution. Unlike the statute which was struck down in *United States* v. *Klein,*[10] S. 1647 neither affects the appellate jurisdiction of the Supreme Court nor does it prescribe for any court, federal or state, trial or appellate, a rule of decision regarding the merits of any

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[7] 3 How. (44 U.S.) 236, 245 (1845). See also *McIntire* v. *Wood,* 7 Cranch (11 U.S.) 504 (1813); *Sheldon* v. *Sill,* 8 How. (49 U.S.) 441 (1850); *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U.S. 511 (1898); *Kline* v. *Burke Construction Co.,* 260 U.S. 226 (1922); *Lauf* v. *E. G. Shinner and Co.,* 303 U.S. 323 (1938); *Lockerty* v. *Phillips,* 319 U.S. 182 (1943); *Yakus* v. *United States,* 321 U.S. 414 (1944); *Palmer* v. *United States,* 411 U.S. 389 (1973).

[8] Court-ordered School Busing: Hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (hereafter, "*Hearings on S. 1647*") 391-392 (statement of Lino A. Graglia, Professor of Law, University of Texas School of Law).

[9] Wright, p. 26. "[Congress] can take away from the courts power to grant a particular remedy or to enforce a particular kind of contract." *Id.*

[10] 13 Wall. (80 U.S.) 128 (1872).

particular school desegregation case or of school desegregation cases in general. The Act simply withdraws one possible remedy from one of the two judicial systems empowered to hear school desegregation cases.

Further, the findings made by the Subcommittee after extensive hearings on the problems caused by the forced busing of children demonstrate that S. 1647 is not an arbitrary or capricious Act which violates the Due Process clause of the Fifth Amendment. The evidence presented at the hearings, and discussed in detail below, provides a strong basis for the determination by Congress that the withdrawal of the jurisdiction of the federal courts to order the busing of school children to achieve "racial balance" in the public schools is a measured, rational means to averting the evils set forth in the findings of the Act.

The Subcommittee is aware of no explicit holding by the Supreme Court that a victim of *de jure* segregation in the public schools has a constitutional right to a federal or state court order of forced busing.[11] Assuming for the purposes of argument, however, that a mandatory busing scheme is the only effective remedy for a particular case of *de jure* school segregation, S. 1647 does not preclude a state court from entering such an order.

Thus, S. 1647 extinguishes no constitutional rights; it is not an arbitrary and capricious exercise of the legislative power; and it does not dictate a rule of decision for either the federal or the state judiciaries. The Subcommittee concludes that S. 1647 is a constitutional exercise of the Article III power to regulate the jurisdiction of the federal courts.

The Subcommittee also concludes that S. 1647 is an exercise of the power of Congress to enforce the provisions of the Fourteenth Amendment to the Consitituion.[12] While the Act is not directed at the actions of the courts or governments of the several states, it is intended to correct evils and to eliminate racial classification and discrimination resulting from the federal courts' busing orders, which are issued in the name of guaranteeing the equal protection of laws under the Fourteenth Amendment. Where, in the words of Dean William Harvey, the "judicial remedy has become a wrong,"[13] the Congress, under its broad enforcement authority granted in Section 5 of the Amendment, has the power to determine "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[14] By eliminating a source of the forced-busing orders which expressly and improperly classify school children on the basis of race, color, and national origin, S.

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[11] "Neither *Swann* nor any other Supreme Court case holds that there is a constitutional right to attend a racially balanced school or a constitutional right to be taken to school by bus for that purpose." Equal Educational Opportunities Act: Hearings Before the House Committee on Education and Labor on H.R. 13915, 92d Cong., 2d Sess. 1163 (1972) (statement of Charles Alan Wright, Professor of Law, University of Texas School of Law). But see below, pp. 13–17.

[12] Amendment Fourteen Section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[13] Hearings on S. 1647 at 291 (statement of William F. Harvey, Professor of Law and former Dean, School of Law, Indiana University-Indianapolis).

[14] *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). On the intent of the framers of the Fourteenth Amendment, see Raoul Berger, "Congressional Contraction of Federal Jurisdiction," 1980 Wisconsin Law Review 801, 807–809: "Judicial enforcement against the will of Congress would convert 'Congress shall' into 'the Court shall.' Such a conversion would usurp power withheld."

1647 is clearly a measure which the Congress may conclude is needed to secure Fourteenth Amendment guarantees.

IV. Historical and Legal Background

When the landmark case of *Brown* v. *Board of Education (Brown I)*, 347 U.S. 483 (1954), invalidated state laws establishing racially segregated public school systems on the ground that they violated the Equal Protection Clause of the Fourteenth Amendment, the decision also invalidated previous holdings of the Supreme Court itself. Thus, before assuming that the federal judiciary and, in particular, the United States Supreme Court are the surest, most constant guardians of the rights and duties established by the Constitution, Congress should remember that the pre-1954 Court was quite willing to condone legally mandated segregated schools and that the post-1954 Court has shifted from holding that the Equal Protection Clause requires racially neutral state laws to holding that equal protection not only permits but requires racially discriminatory state laws.

The decisions of the Supreme Court from the 1954 *Brown* case to the present also reveal that the Court has lost sight of its primary function as a judicial institution—determination of the rights and duties of particular litigants in the case before the Court—and has engaged instead in the legislative function of formulating plans and programs calculated to respond to changing social circumstances and articulated in terms of races and classes of people instead of individuals. By endorsing racial balance in public schools as, for all practical purposes, a constitutional right as well as a desirable social and political goal, the Court has at once justified social engineering by the federal judiciary and attempted to remove entirely the issue of racial desegregation of the public schools from the political, that is, the legislative, realm of American government.

A. PRE-BROWN CASES

In the first racial discrimination case to reach the Court after the Civil War, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), the Court, with two justices dissenting, held that a state law limiting the eligibility for serving on juries in state proceedings to "white male persons who are twenty-one years of age and who are citizens of this State," was invalid as "a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the State . . ." 100 U.S. at 310.

The Court explained the "true spirit and meaning of the Civil War Amendments," and particularly the Fourteenth, in broad terms:

> The Fourteenth Amendment was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship to persons of color, but it denied to any State the power to withhold from them

> the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate language. *Id.* at 306.

The Court, after citing several passages from the earlier opinion in the *Slaughter-House* cases,[15] continued:

> If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color. *Id.* at 307.

However, in subsequent cases concerning segregation in public schools the Supreme Court has not always taken the position that the Equal Protection Clause of the Fourteenth Amendment requires racially integrated public schools, much less that it requires recially balanced public schools. In the noted case of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), the Court held that a Louisiana law requiring that railway passenger cars have "equal but separate accommodations for the white and colored races" violated neither the Thirteenth nor the Fourteenth Amendments. In passing, the Court noted the separation of races in public schools by states and, in the District of Columbia, by the United States Congress and remarked that such separation has "been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced," and "the constitutionality of which laws does not seem to have been questioned . . ." 163 U.S. at 544, 551. Only Justice Harlan dissented.

Twelve years after the *Plessy* decision, the Court upheld the state conviction of a private college corporation for violating a state law which made it unlawful for "any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as

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[15] 16 Wall. (83 U.S.) 36 (1873). The *Slaughter-House* cases did not involve racial discrimination. The *Strauder* Court, referring to the *Slaughter-House* cases opinion, said that "the true spirit and meaning of the Amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish." (100 U.S. at 306) The Court also stated, "And it was added (in the Slaughter-House Cases), 'We doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision.' " *Id.* at 307.

pupils for instruction . . ." *Berea College* v. *Kentucky*, 211 U.S. 45 (1908). The Court declined to consider the question of whether the statute was valid as against individuals; instead, it upheld the law, as applied to the defendant corporation, as a valid exercise of the "power of a state over its own corporate creatures." 211 U.S. at 58. Justices Harlan and Day dissented.

It was not until 1950 that the Court repudiated in effect, if not in its express holding, the "separate but equal" doctrine as it applied to racial discrimination in education.[16] In *Sweatt* v. *Painter, supra*, the black plaintiff was denied admission to the University of Texas Law School in 1946. He then petitioned for a writ of mandamus to compel his admittance. Between the trial of the case and the hearing before the Supreme Court, a new law school for blacks was opened by the state of Texas.

The Court compared and contrasted the quantitative aspects of the white and black law schools in Texas and also contrasted "those qualities which are incapable of objective measurement but which make for greatness in a law school," 339 U.S. at 634, and found that the white and black facilities were not substantially equal. *Id.* at 633. Therefore, the Court held that "the Equal Protection Clause of the Fourteenth Amendment requires that petitioners be admitted to the University of Texas Law School." *Id.* at 636.

In *McLaurin* v. *Oklahoma State Regents, supra*, the black plaintiff had successfully obtained admission to the only state university which offered a doctoral program in education. That school had been limited to white students. However, once it had been ordered to admit plaintiff as a student, the school treated him differently because of his race. Plaintiff sought to enjoin the school from imposing segregated conditions upon him. The Court held the "appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races," and reversed the judgment of the U.S. District Court which had denied plaintiff relief. 339 U.S., at 642. Both the *Sweatt* and *McLaurin* decisions were unanimous.

The Court's new practice of evaluating the factual educational conditions available to students in order to determine whether the state provided "substantially equal" facilities and hence afforded all students the equal protection of laws reached its conclusion in *Brown I, supra*. There, the Court adopted the finding of the Kansas court which stated, "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits

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[16] The Court in *Brown* v. *Board of Education* cites *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938), and *Sipuel* v. *Oklahoma*, 332 U.S. 631 (1948), as well as *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950), discussed infra, in support of the statement that "[i]n more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications." The references to *Gaines* and *Sipuel* are misleading. In these two cases, there is no rejection, either express or implied, of the "separate but equal" doctrine. Rather, in both cases, black plaintiffs applied for admission to state law schools in states where no state law schools for blacks existed. Under these circumstances, the Court held that "the State was bound to furnish [the black plaintiff] within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." *Gaines*, 305 U.S. at 351. The provisions of Missouri and Oklahoma to pay for Negro law students' tuition at out-of-state law schools was deemed to be not "substantially equal." Both cases were actions for writs of mandamus. The Court in *Brown I* cited the *Berea College* case, discussed *infra*, without comment.

they would receive in a racially integrated school system." 347 U.S. at 494. The Supreme Court continued "Whatever may have been the extent of psychological knowledge at the time of *Plessy*, this finding is amply supported by modern authority. Any language in *Plessy* contrary to this finding is rejected." And the court concluded, "Separate education facilities are inherently unequal." *Id.* at 494-495.

B. POST-BROWN CASES

In *Brown I* the Court consolidated four cases, each of which was a class action. In each case the plaintiffs, Negro school children, sought admission "to the public schools of their community on a non-segregated basis." 347 U.S. at 487. The Court unanimously held that the creation of separate, segregated educational facilities deprived the plaintiffs of the equal protection of the laws. However, the Court did not order relief in any of the cases under review:

> Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. *Id.* at 495.

The Court then scheduled the case for reargument yet again, this time for reargument on the questions of remedies, which questions had been among those posed for the 1953 Term argument of *Brown*. However, even after hearing the second reargument, the Court still declined to decree specific relief. *Brown* v. *Board of Education (Brown II)*, 349 U.S. 294, 299 (1955):

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

Accordingly, the Court remanded the cases to the U.S. District Courts

> to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. 349 U.S. at 301.

Without taking into account the impediment of public opposition, the mandate in *Brown II* to take steps necessary to admit public school students on a racially non-discriminatory basis was one with which all states could have complied by the beginning of the next school year. States in which there was little public opposition to *Brown II* promptly took steps to comply with the Court's holding:

> By the opening of the (1955) a fall term in the following year only eight states remained completely segregated in their system of public schools; and more than a quarter of a million Negro children were attending desegregated schools in states which had the year before required segregation.[17]

However, not all states and school districts proceeded with such alacrity, and at the root of the problems of school desegregation in the years since 1955 is the refusal of the Court to decree specific relief to the litigrants in *Brown II* and to instruct the inferior courts on specific remedies available in school cases. Professor Lino Graglia, a careful student of the school desgregation and subsequent forced busing cases, offers four criticisms of the Court for its failure to grant relief: [18]

> 1. "First, [the failure] was likely to be interpreted—and it was—as vacillation, as uncertainty on the part of the Court that its new law would prevail." *Id.* at 35.
> 2. "Second, leaving the question of relief to the district courts with an explicit authorization of delay depending on 'good faith' and 'the public interest' put those courts in an untenable position . . . the only defense to intense opposition a local judge could have had for ending segregation was the clear and irresistible mandate of higher authority, and that mandate the Court did not provide." *Id.* at 35–36.
> 3. "Third, the Court's decision lost sight of the individual plaintiffs, whose rights, in legal theory, provided the Court's only warrant for making a decision." *Id.* at 36.
> 4. "By far the most unfortunate consequence of the Court's refusal to decree relief, however, was that it erroneously complicated and confused the issues." *Id.* at 37.

The latter two points in particular serve to illuminate our understanding of the actions of the Supreme Court and the inferior federal courts in the period between *Brown II* and the present. By refusing to decree relief to the individuals appearing before it, the Court shifted the focus from the particular litigants to blacks as a group. In *Brown II* the black race, not the black litigants, received a promise of future improvements, not a decree of specific relief. The effect, of course, was to use the same racial classification that underlay the discrimination and segregation the Court wished to invalidate.

The focus on the black race also gave rise to the notion that the black race, as a race, has rights. By failing to require the legally simple, though socially difficult, relief of requiring immediate assignment of childern to schools without regard to race, the Court complicated the legal problem by delegating to the inferior courts the function of determining and decreeing the relief appropriate in each case. This, argues Professor Graglia, led to the metamorphosis of the original prohibition of segregation into a requirement of in-

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[17] R. McKay, " 'With All Deliberate Speed': A Study of School Desegregation," 31 N.Y.U. Law Review 991 (1956).

[18] Graglia, "Disaster by Decree: The Supreme Court Decisions on Race and the Schools" (1976).

tegration and to a shift in concern from "desegregation" to the "desegregation plan."

C. THE 1964 CIVIL RIGHTS ACT

A decade of uncertainty about the commitment of American government to racial equality was ended with passage of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964). The act reflected a consensus in Congress supporting the principle of racial nondiscrimination or racially neutral laws and rejecting racial discrimination for the purposes of achieving integration.

Title VI of the act, "Nondiscrimination in Federally Assisted Programs," states:

> No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financing assistance.

Other provisions of the statute also demonstrate that it was intended to prohibit racial discrimination, not to set up a new system of racial classification and quotas. Title IV of the act, "Desegregation of Public Education," authorizes the Attorney General of the United States to initiate school desegregation actions and explains that "desegregation" does not mean assignment of students to overcome racial imbalance:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

A proviso to section 407 emphasizes that the Act did not give federal officials or courts the power to transport students in order to overcome racial imbalance:

> Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance . . .

Section 410 implies that classification by race is prohibited: "nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

Thus, the language of the Act unambiguously prohibits all racial discrimination whether intended to promote segregation or integration. The legislative history of the Act also supports this interpretation. Opponents of the act had begun to voice concern that the act might require racial discrimination to achieve integration or racial balance. Proponents of the bill assured them that it would only eliminate racial segregation and would not set up an affirmative and race-conscious plan of integration. While there are many examples from the Senate debate in which proponents of the act make assurances that it would embody a standard of racial neu-

trality, certain remarks made by Hubert Humphrey, the floor manager in the Senate, offer the most concise explanation of what the act would do:

> [The *Gary*] case [*Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209 (2d Cir. 1963)] makes it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate schools, but it does attempt to eliminate segregation in the school systems. 110 Cong. Rec. 12717 (1964), cited in Graglia, *supra,* at 51.

The standard of racial neutrality set forth in the Civil Rights Act of 1964 has never been implemented by the executive branch or the federal judiciary. Despite the clear language and history of the act, both the executive branch and the federal judiciary have sought to impose a requirement of racial balance.

The decision in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), provided the first clear indication that the Supreme Court would not be satisfied with racially neutral laws. The New Kent County school system had operated two schools on different sides of the county, schools that had been segregated *de jure,* that is, by requirement of state law. After *Brown II,* the defendant school board adopted a freedom-of-choice plan which gave each pupil some liberty in selecting the public school he would attend. As might have been expected, the racial composition of the schools did not undergo an immediate dramatic change. At the time the lawsuit was filed, one school was predominantly white and the other school was exclusively black, because few blacks had applied for admission to the formerly *de jure* all-white school. The plaintiffs in the case sought injunctive relief against the school board's continued maintenance of an allegedly racially segregated school system.

The Court held that when public schools continue to be racially imbalanced, a freedom-of-choice plan is not a sufficient remedy, even though in other circumstances it might be. A student assignment plan would be sufficient only where it "dismantles the state-imposed dual system at the earliest practicable date." In *Green,* the Court began to use the words "dual system" to signify a system in which racial imbalance existed not because of present state discrimination but as a symptom of past discrimination. This semantic shift prepared the way for racially discriminatory busing by focusing on a social condition, racial imbalance, and not on state action as the real constitutional evil in school desegregation cases. By reinterpreting the words "dual system," the Court managed to appear as if it were combatting racial discrimination while in fact it was preparing to promote racial discrimination—racial discrimination for the purpose of achieving racial balance. When it decided *Green,* the Court did not actually require racially discriminatory busing, however. Its suggested remedy for a "dual system" was to

replace the freedom-of-choice plan with a neighborhood school attendance plan.

But two years later, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970), the Court embraced mandatory busing for racial balance. The facts of *Swann* are similar to those of *Green* in that the school system had been segregated *de jure* and that, while *de jure* segregation had ended, the schools were racially imbalanced. The federal district court in *Swann* held that the plaintiffs were entitled to injunctive relief from continued maintenance of a dual school system. As in *Green*, the district court used the words "dual school system" to mean a racially imbalanced school system. The district court in *Swann* was not satisfied, however, with the remedy of requiring the school board to adopt a neighborhood school assignment plan. Instead, it ordered the school board "to reach a 71%-29% white to black student ratio in the various schools" by adopting a plan that included extensive busing of students on the basis of their race. 402 U.S. at 23.

On review, the Supreme Court affirmed the plan. It neatly sidestepped the antibusing provisions in the Civil Rights Act of 1964 by ruling that those provisions were intended not to reduce the power of the federal courts, but only to ensure that the provisions of the act did not expand the power of federal courts to enforce the equal protection clause. *Id.* at 16. The Court then went on to determine that a district court could use racial ratios or quotas in shaping a remedy and rejected in its own words the standard of racial neutrality: " 'Racially neutral' assignment plans proposed by school authorities may be inadequate." *Id.* at 28. It admitted that busing or, to use its terminology, "remedial altering of attendance zones" may be "administratively awkward, inconvenient and even bizarre in some situations." *Id.* at 28. It went on to hold, however, that where assignment of student to neighborhood schools would not effectively dismantle a dual school system, remedial power of a federal district court properly included the power to rearrange attendance zones and to order busing for racial balance of students within the rearranged attendance zones. *Id.* at 27.

With *Swann* the Court fully committed itself and the federal judiciary to classifying students by race. In *Green* the Court had shown that it was willing to recognize racial imbalance as prima facie evidence of a violation of the Constitution and that it was no longer satisfied with the standard of racial neutrality that permitted nondiscriminatory school assignment plans. In *Swann*, the Court showed that it was not only willing to require racial balancing, but also ready to permit court-ordered assignment of students on a racial basis. *Id.* at 28.

The Court stated its new position most explicitly in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971), a companion case to *Swann* v. *Charlotte-Mecklenburg Board of Education*. According to the Court's holding in *North Carolina State Board of Education* v. *Swann*.

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy . . .

> We . . . conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance of ratio' will . . . hamper the ability of local authorities to effectively remedy constitutional violations. 402 U.S. at 46.

The Court clearly rejected color blind assignment: "that requirement [color blind assignment], against a background of segregation, would render illusory the promise of *Brown* v. *Board of Education*". *Id.* at 45–46.

Ironically, by the reasoning in *Swann*, the Supreme Court and the federal judiciary have sought equality by advocating a discriminatory "remedy" for violations of the "right" to be free from racial discrimination. Missouri Attorney General John Ashcroft points out that they have substituted one immoral system for another:

> [T]he overarching problem with busing for racial balance, imposed as a remedy for the immoral and unconstitutional system of segregated schools that existed prior to 1954, is that forced busing itself is immoral and unconstitutional. This is not simply a case of the cure being worse than the disease; rather, forced busing is an attempt to cure racism and coercion with more racism and more coercion. . . . The argument for busing rests on the premise that a school with, say, 60% white students and 40% black students is inherently more moral than an all-white or an all-black school. . . . What was and remains immoral is racial classification and coercion.[19]

According to General Ashcroft, court-ordered busing is an example of "the transformation of our federal courts from guardians of individual rights into balancers of class interests." He argues persuasively that these two roles are incompatible:

> Individual rights, while they may be limited in scope, are absolute within their boundaries; class interests, on the other hand, tend to be defined relative to other interests. In a universe full of interests to be balanced there seems little room for absolutes. *Id.*

William F. Harvey, testifying before the Separation of Powers Subcommittee, agreed that the federal judiciary is improperly deviating from its constitutionally defined function:

> Today school desegregation litigation has become bizarre and so constitutionally contorted that there is a kind of unwritten assumption that when a school board or other public authority has been found to have engaged in discrimination which was an invasion of the person's right under the Fourteenth Amendment, then, in some way, that person's right is transferred to a kind of possessory interest or power of the United District Court system. It is used in any way which the United States District Court wants to fashion. Hearings on S. 1647 at 290–291.

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[19] Ashcroft, "Possible Alternatives to Forced Busing," in McGuigan and Rader, eds., "A Blueprint for Judicial Reform" 211 (1981).

In other words, after having found that a school board or other public authority has violated the constitutional rights of a class of persons, such as minority school children, the inferior federal courts have assumed the power of administering the schools without giving sufficient regard to constitutional and legal limits on their authority. Taking sociologists and not the law as a source of inspiration, they have administered these school systems primarily by consulting their own personal notions of how to achieve equality. The practices of such judges in school desegregation cases consitute a clear example of how federal judges have exceeded the proper limits of their authority.

Dean Harvey also observed that the federal courts may exceed the limits of their authority when they automatically order class remedies following a determination of class liability:

> One can agree with the proposition that a determination of class liability is available to a class of persons, but it does not follow from this (and here I think a major constitutional blunder has developed) that a class remedy is available simply because a court finding of class liability has occurred. *Id.*, at 291.

Court-ordered busing, then, is at best a highly attenuated "justice" dispensed to statistical classes rather than to each individual who has been wronged.[20]

V. The Findings of S. 1647

FINDING NO. 1

The first three findings of the Act generally concern the effects of forced busing upon society. Finding No. 1 states that mandatory busing to achieve racial balance "often encourages greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools." This finding is amply supported by the testimony and research of Dr. Charles T. Clotfelter and Dr. J. Michael Ross.

Dr. Clotfelter, a professor of public policy studies and economics at Duke University, testified that his research into the effect of mandatory busing indicates that many whites respond to such busing in their school district by either moving out of the district, the phenomenon called "white flight," or removing their children from public schools and placing them in private schools. Hearings on S. 1647 at 210–211.

Dr. Ross, a professor of sociology at Boston University, found that white flight occurred in every city he studied. Based upon his surveys of parental reactions to court-ordered busing and upon analyses of school loss rates within cities, he found:

> In the first year of court-ordered school desegregation, there is at least a doubling of the white loss and typically three to four times the loss rate that would be expected due to normal demographic factors. This loss continues in

[20] See generally Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegration Litigation," 85 Yale Law Journal 470 (1976).

> subsequent years. No city has experienced a pattern where the losses incurred in the first year are someway compensated by relative gains in subsequent years as some people have argued.
>
> Research shows that most of this loss is due to desegregation—at least two-thirds. It is permanent and not temporary. Unfortunately, it may not be reversible. *Id.* at 193.

He concluded that mandatory busing has produced racial imbalance not the racial balance intended.

The strongest argument against Finding No. 1 was made by Professor Reynolds Farley of the University of Michigan, yet he also conceded that "demographic studies of 'white flight' demonstrate that when an extensive integration plan is implemented, there is often an unusually large decline in white enrollment." *Id.* at 239. Professor Farley's point was that the decline in white students resulting from white flight is but a small portion of the long-term decline in white enrollment in urban public schools due to other demographic trends such as declines in fertility and the larger trend toward small white populations in the largest American cities.

Professor Farley also alluded to studies that "suggest that racial residential segregation decreased, rather than increased, after the public schools were integrated," but the Subcommittee finds that Professor Farley's conclusion, if true, is quite consistent with Finding No. 1. *Id.* at 237. The white population that remains after a mandatory busing plan is implemented, might well be more conducive to greater residential and cultural integration with the minority population. This does not refute the findings that the forced busing causes whites to move from the cities or, in light of the evidence of a long range trend showing that whites are also leaving the cities for other reasons, that the forced busing accelerates the rate of white departure.

Considering all of the evidence presented on this question, the Subcommittee concludes that Finding No. 1 of S. 1647 is supported by strong evidence and that the finding is indeed correct.

FINDING NO. 2

Finding No. 2 states that busing—

> does not adequately take account of the fact the racial and ethnic imbalance in the public elementary and secondary schools is often the result of economic and social factors rather than past discrimination by public officials.

The Subcommittee finds the evidence presented in Eleanor Wolfe's study particularly persuasive on this point.[21] In the absence of clear evidence of governmental actions and laws aimed at segregating the public schools, federal judges have often assumed, and, based on the assumption, have then concluded that subtle governmental discrimination must be at the root of the racial imbalance in the schools. Wolfe argues convincingly that economic and social factors ignored by the judges and often not argued by the attorneys are more often the real cause:

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[21] Wolfe, "Trial and Error: The Detroit School Desegration Case," (1981).

> [A]vailable materials indicate that housing decisions involve complex cost-benefit calculations and the socioeconomic characteristics of an area, as well as some clustering tendencies by both blacks and whites, are paramount. *Id* at 79.

In response, Professor Meyer Weinberg, Director of the Horace Mann Bond Center for Equal Education, University of Massachusetts, contended that a school system "that was once deliberately segregated *can* expand without further deliberate efforts by school authorities." *Hearings on S. 1647* at 113 (Emphasis supplied.). Professor Weinberg noted, furthermore, that "school districts often influence the very economic and sociologic factors that result in segregated housing." *Id.*

The Subcommittee finds Professor Weinberg's critique of Finding 2 unresponsive. To say that school districts *can* influence the economic and social factors that result in segregated housing does not preclude economic and social factors from influencing the racial composition of school districts. When courts fail to look at other factors besides the racial make-up of school districts, they are simply assuming what they are attempting to prove—that racial imbalance results only from *de jure* segregation.

Accordingly, the Subcommittee concludes that there is sufficient evidence to support Finding No. 2.

FINDING NO. 3

Finding No. 3 states that mandatory busing of school children to achieve "racial balance"—

> is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation.

S. 1647 withdraws from the federal courts the single remedy of mandatory busing. The federal courts retain the power to require that school districts implement various other measures to rectify *de jure* segregation, including the use of voluntary integration plans such as magnet schools and voluntary desegregation of incentive plans described by Herbert J. Walberg, Professor of Education at the University of Illinois. *Id.* at 176–77.

Ralph Scott, Jr., Professor of Education, University of Northern Iowa, made a significant point about a study done by busing advocate Roy H. Forbes. Forbes concluded only that desegregation and compensatory education programs "did not negatively impact on the educational attainment of Southeasterners, White or Black." Professor Scott commented:

> This I find unconsoling: if the discomfort associated with, and the billions of dollars spent on, busing and compensatory education do nothing more than not make things worse in our schools then such endeavors should be abandoned. "Junked" might be a better word. After all it is well established that Black and poor children suffer most because of inflation and higher taxes, both factors associated with busing and compensatory education. (Letter

to Senator East, January 25, 1982, in Hearings on S. 1647 at 180–181.)

The Subcommittee finds the testimony of Willis D. Hawley, Dean of Peabody College, Vanderbilt University, unconvincing. Dean Hawley, arguing that it is a myth that "desegregation can be achieved without busing and largely through voluntary choice," nevertheless failed to offer any evidence that busing is, in fact, an effective remedy to *de jure* segregation of the public schools. His argument, as is the case with most pro-busing arguments, mistakenly assumes that the purpose of remedial court action is not simply the elimination of intentional racial discrimination but is, in his words, the "substantial reduction of racial isolation." *Id.* at 126–127. The Subcommittee finds, however, that goals such as the elimination of "racial isolation" through the use of programs requiring racial classification are goals which are impermissible under the Constitution and that the use of such means violate the very Equal Protection of law they are intended to promote.

Accordingly, the Subcommittee concludes that there is sufficient evidence to support Finding No. 3.

FINDING NO. 4

Finding No. 4 states that busing "causes significant educational, familial, and social dislocations without commensurate benefits."

Los Angeles, California, provides one of the most recent examples of the massive disruptions attending court-ordered busing for racial balance. Both in anticipation of and during the busing period, white students deserted the Los Angeles public schools in large numbers. The number of white students in Los Angeles schools dropped from 219,359 in 1976 to 125,654 at the beginning of the 1980–81 school year, a loss of 42.7 percent of the white school population. About 23,000 students in Los Angeles schools were being bused. In 1981, when it appeared certain that the busing program would be ended and when the school board provided each student the opportunity to return to his neighborhood school, 7,300 students immediately chose to avoid busing—4,300 of these students were members of minority groups.[22]

Boston, Massachusetts, provides another clear example of how busing causes disruption and discontent. On National Boycott Day, October 3, 1974, attendance at Boston public schools dropped to a low of 41,800 from a possible enrollment of about 82,000. Litigation in the federal courts resulted in a busing plan that required 25 policemen inside one Boston school, South High School, and 300 outside to maintain order. On January 8, 1975, South High School reopened with 627 students, 500 policemen, and metal detectors at the doors.[23]

After six years of court-ordered busing for racial balance, a Boston Globe poll of June 2 and 3, 1980, showed that both blacks

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[22] Hearings on S. 1647 at 201–206 (statement of Professor J. Michael Ross); The 14th Amendment and School Busing: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 27–29 (1981) (statement of David J. Armor).

[23] Ross and Berg, "I Respectfully Disagree with the Judge's Order": The Boston School Desegregation Controversy 359 (1981); U.S. Commission on Civil Rights, "Desegregating the Boston Public Schools: Crisis in Civic Responsibility" 76, 131 (1975).

and whites in Boston, in their mutual desire to raise the quality of education, preferred school improvement programs to mandatory busing, four to one. 127 Cong. Rec. S6651 (daily ed. June 22, 1981) (statement of Senator Johnston).

These examples of the disruption associated with mandatory busing in two of our leading cities provide ample evidence to support Finding No. 4.

FINDING NO. 5

Finding No. 5 states that busing "undermines community support for public education." The truth of this statement is illustrated by the proliferation of private schools and the flight from targeted public school districts which take place in the wake of mandatory busing. The shift in support away from the public schools and toward private schools is well documented by Professor Charles T. Clotfelter in "School Desegregation, 'Tipping,' and Private School Enrollment," 11 Journal of Human Resources 28 (1976).

Indeed, no finding of S. 1647 is less controversial than No. 5. Except for conclusory rejections of the Finding by some probusing witnesses. Hearings on S. 1647 at 174–175, no substantive criticism of it was offered at the hearings, and one pro-busing witness, Dr. Hawley, id., at 174, indicated that he agreed with the Finding.

The Subcommittee concludes that there is ample evidence supporting Finding No. 5.

FINDING NO. 6

Finding No. 6 states that busing "often tends to disrupt social peace and racial harmony." The Subcommittee heard accounts of the social disturbances caused by mandatory busing in Charlotte, North Carolina, and Boston, Massachusetts. Mrs. Jane Scott, a former member of the Charlotte, North Carolina, school board, testified concerning the "war-like atmosphere" that pervaded the junior and senior high schools in Charlotte after the imposition of mandatory busing. She reported how "police were ordered to wear riot gear, when answering a 'disturbance' call at a school." *Id.*, at 650–651.

Professor Nancy St. John, after a careful review of research on busing to achieve "racial balance," concluded that "desegregation . . . sometimes promotes . . . stereotyping and interracial cleavage and conflict." [24]

Again, no substantive criticism of this Finding was presented for Subcommittee consideration. The Subcommittee, therefore, concludes that Finding No. 6 is supported by sufficient evidence.

FINDING NO. 7

Finding No. 7 states that busing—

> consumes the study time of students and increases the risks of injury from greater length of travel to and from school.

[24] St. John, "School Desegregation: Outcomes for Children" 85 (1975).

Concerning the part of Finding No. 7 which states that busing "consumes the study time of students," the Subcommittee heard from Dr. Herbert Walberg, one of the nation's leading researchers on the factors that promote the effectiveness of education. Dr. Walberg testified that research and common sense reveals that such factors as increased study time, parental support of school learning, and a close coordination of parental school efforts have consistently proved to produce superior learning results. Hearings on S. 1647 at 150–53.

Concerning the risks of injury posed by the increased busing of students, Senator Jesse Helms of North Carolina testified that injuries to children caused by bus accidents have increased dramatically since the courts began to order the busing of children to schools to achieve racial balance.

> The U.S. Department of Transportation, Mr. Chairman, has reported that in the State of North Carolina alone for the school year 1977–1978 there were 1,292 school-bus crashes in which 1,020 schoolchildren and busdrivers were injured and 263 other passengers were injured, for a total of 1,283. *Id.* at 439.

These figures represent, he said, an increase of about 30 percent in the number of accidents and about 50 percent in the number of injuries over pre-busing figures. In Senator Helms' words, "One crippled child and certainly one dead child is just too high a price to pay in terms of human value for a social experiment that is a demonstrable failure." *Id.*

Mandatory busing, however, diverts funds and the time and energy of educators, parents, and students that the positive factors adduced by Dr. Walberg require for success. The economic cost of busing is enormous. Senator Helms testified that in the Charlotte-Mecklenburg area of North Carolina, the cost of gasoline for operating school busing increased thirtyfold between 1969–70 and 1980–81, an increase that cannot be explained by the increase in the price of gasoline during that time. Money spent on gasoline is money not spent on teacher salaries, on needed educational materials, and on the maintenance and services needed to keep our schools operating. The time spent by students on school buses is time not spent on their studies and not channeled into other curricular and extra-curricular pursuits.

The criticism of Finding No. 7 was mostly conclusory. It is difficult to imagine facts or statistics that can "disprove" such commonplace conclusions about busing as its high cost and the time in transit that it demands on the bused children. For these reasons, the Subcommittee concludes that there is ample support for Finding No. 7.

FINDING NO. 8

Finding No. 8 states that busing "debilitates and disrupts the public educational [system] and wastes public funds and other resources." In the testimony of Senator Helms in support of Finding No. 7, *supra*, the Subcommittee was presented with sufficient evidence to support the assertion that busing "wastes public funds

and other resources." Dr. Ralph Scott testified that busing diverts and wastes resources that could be directly applied to improving the education of our nation's youth:

> I have worked in ghetto schools. All I can say is that there is so much that needs to be done in the processes of learning that I wish we would cease diverting resources into court mandates which have no demonstrable value and get onto the task of providing every child, irrespective of race or social background, the fullest and the greatest opportunity to develop competency. It is competency that will lead to actual integration. *Id.* at 192.

Professor Weinberg, in criticizing Finding No. 8, stated that some busing programs have actually served to rehabilitate school systems and that there is no evidence that all school systems subject to mandatory busing have been put "through the wringer." Further, he states that "desegregation does not create educational problems; it uncovers them" *Id.* at 114.

The Subcommittee finds that the social and educational costs exacted by busing programs are much too high a price to pay for the chance that problems existing within a particular school system might be discovered and as a result the school district rehabilitated. For more than a decade federal judges have been requiring state and local school boards to assign and transport students to public schools on a racially discriminatory basis solely for the purpose of achieving particular degrees of racial balance in the schools. As a result of this court-ordered busing for racial balance, public schools have become battlegrounds for competing social theories, communities have been torn apart, and dissatisfaction with public schools has increased dramatically. Court-ordered busing for racial balance, moreover, has frequently caused increased racial imbalance and resegregation of public school systems.

The Subcommittee accordingly finds that Finding No. 8 is correct.

FINDING NO. 9

Finding No. 9 states that federal court-ordered busing "unreasonably burdens innocent persons who are not responsible for the wrongs such assignment and transportation are purported to remedy."

Court-ordered busing results in thousands of school children of all races and national origins being prohibited from attending the schools of their own and their parents' choice. The children are assigned to schools solely on the basis of a racial mixture or ratio desired by the court. The burden upon the children is reflected in the time spent by the children riding buses to and from school and in the many restrictions, seemingly minor to adults but meaning so much to school-age children, upon their ability to participate in extra-curricular activities as a result of the busing programs.

The parents must cope with the inconvenience of having their children attend schools that are miles from home. The parents also shoulder the burden of forced busing when, as taxpayers, they are required to foot the bill for the administration of mandatory busing

programs. Busing also complicates the tasks of school administrators who need to gear all plans for their school districts to the court-decreed primary scholastic objective of racial and ethnic balance in the schools.

It was earlier argued that the appropriate relief and the relief originally prayed for in *Brown* v. *Board of Education* and other desegregation cases is just that—desegregation by requiring admittance of students to schools previously closed to them for reasons of race or ethnic background. Desegregation, of course, requires changes and sometimes quite extensive changes in the attendance patterns of school districts, and such changes naturally cause inconveniences and burdens on school students, parents, and school administrators. But the magnitude of these burdens pales when contrasted to those inflicted by court-ordered busing. See *supra*, at pp. 20–23.

Even in a case where *de jure* segregation can be clearly proved, it is not the guilty school administrators or directors who bear the brunt of the ensuing court orders, it is the children and their parents, both as parents and as taxpayers, who must endure the hardships of busing and of the essential illegitimacy of these policy determinations made by the federal courts. Unlike in the political policy-making processes which should be the source of such programs, the students and parents have no influence upon the policy-making processes of the federal judges, who are answerable to no one and secured in their position for life. The Subcommittee finds that the usurpation of political power by the federal courts in the ordering and overseeing of mandatory busing programs is a perversion of the constitutional function of the federal judiciary and finds further that the usurpation typically results in a fundamentally unjust allocation of the human and financial costs of these ill-conceived, discriminatory programs.

For these reasons, the Subcommittee concludes that Finding No. 9 is supported by the available evidence.

FINDINGS NOS. 10 AND 11

The tenth finding is that federal court-ordered busing "infringes on the right to racially and ethnically neutral treatment in school assignment," and the eleventh states that such busing "has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools." The support for these legal findings is presented in some detail in Part IV of this report.

The Equal Protection Clause of the Fourteenth Amendment guarantees Americans of all races and national origins equal status before the laws of the States: in other words, the laws must be neutral with regards to race and national origin. The Supreme Court recognized this in the *Strauder* case and, after regrettably forgetting this truth for more than a half-century between *Plessy* and *Brown I*, reiterated the guarantee once again. *Brown II* required the inferior federal courts to issue such orders and decrees necessary to assure students admittance to public schools "on a racially nondiscriminatory basis," 349 U.S., at 301.

Regardless of whether the Congress may, under the enforcement power of the Fourteenth Amendment, mandate remedial or "reverse" discrimination, see *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and regardless of whether such a political and social policy is desirable, the Congress has not in fact mandated discriminatory or remedial assignment of students to the nation's public schools. The language of the Civil Rights Act of 1964, in which Congress definitively expressed its will in this matter, and of Senator Humphrey make this conclusion quite clear. Without such legislation by Congress, and, the Subcommittee concludes, even with such legislation, the courts cannot ignore the requirement of the Fourteenth Amendment that state laws be neutral with regard to race and national origin. *Supra*, at pp. 7–8.

Nor is there any defensible basis for the assumption by the Supreme Court that the social policy of racial balancing in the public schools is required by the Constitution. The Court has used the ambiguity implicit in the words "dual system" to justify findings of *de jure* segregation where only racial imbalance, at most a symptom of deliberate discrimination, can be proved. This legerdemain has been admitted by some members of the Court, but a majority of the justices are not willing to halt the "evolution of the holding in *Brown I* into the affirmative-duty doctrine," *Keyes* v. *School District No. 1*, 413 U.S. 189, (1973) (Powell, J., concurring in part and dissenting in part), and to return to a defensible interpretation of the requirements of the Fourteenth Amendment. See *Keyes* v. *School District No. 1, supra*, opinions of Justices Douglas, Powell, and Rehnquist.

Based upon these reasons and upon the discussion in Part IV, *supra*, the Subcommittee concludes that Finding No. 10 and Finding No. 11 are supported by sufficient evidence.

VI. Subcommittee Action

Senator East introduced S. 1647 on September 21, 1981, and the bill was referred to the Committee on the Judiciary. It was then referred to the Subcommittee on Separation of Powers on September 23, 1981.

The Subcommittee had held a day of hearings concerning school desegregation on May 22, 1981. Then, on September 30, October 1 and 16, 1981, the Subcommittee held hearings focusing on S. 1647. In all, thirty-two witnesses appeared before the Subcommittee presenting a balanced variety of perspectives on the issue of court-ordered school busing. The witnesses included educators, sociologists, school officials, lawyers, and law professors. In addition, one Congressman and four Senators testified.

Following these extensive hearings, the Subcommittee on Separation of Powers met on November 17, 1981, and voted to report S. 1647 favorably with an amendment in the nature of a substitute.

VII. Section-by-Section Analysis

Section 1 is the enacting clause and short title.

Section 2 is the statement of findings and purpose. Subsection 2(a) states that Congress enacts S. 1647 pursuant to its authority under section 1 of article III of the Constitution of the United

States and under section 5 of the fourteenth amendment to the Constitution of the United States. Express mention of these sections does not make them the exclusive authority for enactment of S. 1647, however, and the Subcommittee finds that S. 1647 would be enacted under the authority of other sections of the Constitution that may apply. Subsection 2(b) is the list of findings discussed in Part V *supra*. Subsection 2(c) is a finding which explains that Congress enacts S. 1647 in order to enforce the right to be free from intentional segregation and discrimination in school assignments. This right exists under the fourteenth amendment and Congress has the power under section 5 of that amendment "to enforce, by appropriate legislation, the provisions" of the fourteenth amendment. S. 1647 is such "appropriate legislation."

Section 3 amends chapter 155 of title 28 of the United States Code by adding a new section immediately before section 2283. Section 2283 bars federal court injunctions to stay proceedings in State courts except in certain circumstances. Since S. 1647 withdraws jurisdiction of federal courts to issue certain injunctions, it is appropriate to add the language of S. 1647 in a section of title 28 immediately preceding section 2283 of that title.

The newly added section 2282 withdraws jurisdiction only from the inferior courts of the United States. It does not withdraw appellate jurisdiction from the Supreme Court of the United States nor does it withdraw jurisdiction from any State court. The section withdraws jurisdiction over an exhaustive list of the types of orders that inferior federal courts could use to accomplish the ends specified in parts 1, 2 and 3 of subsection (a). Like the Norris-LaGuardia Act (29 U.S.C. sections 101–10, 113–15), S. 1647 withdraws jurisdiction to issue certain remedial orders, but it does not withdraw any jurisdiction to hear and decide cases on the merits.

Parts 1 and 2 of subsection (a) specify that students shall not be assigned or transported on the basis of race or ethnic group either by direct orders or by orders requiring the closing of any school. Part (3) specifies that teachers and administrators shall not be assigned by any inferior federal courts to schools other than the ones at which they are to perform their duties under contracts they may have with State and local educational agencies. In the case of teachers and administrators who have no contracts stating the schools at which they are to perform their duties, S. 1647 would not affect the jurisdiction of the inferior federal courts to issue orders assigning teachers and administrators to schools.

Subsection (b) of section 2283 defines State and local educational agencies in a manner intended to give the withdrawal of jurisdiction in subsection (a) the broadest possible application.

Subsection (b) of section 3 is a technical provision adding a title for section 2282 to the section analysis of chapter 155 of title 28 of the United States Code.

Section 4 of S. 1647 amends the removal provisions of title 28 for the purposes of allowing State courts to resolve desegregation suits filed in State courts without having those suits removed to inferior federal courts. The effect of section 4 is to assure that State courts would continue to be available as a forum granting the remedies no longer available in federal courts after enactment of section 3 of S. 1647. The general problem addressed by section 4 was discussed by

Professor Laurens Walker and Mr. Robert C. Eckhardt in the hearing on October 1, 1981. By adopting section 4, the Subcommittee did not accept Mr. Eckhardt's argument that the Constitution requires the availability in some forum of the remedies prohibited by section 3. Instead, the Subcommittee adopted section 4 as a matter of prudence and legislative discretion.

Section 5 is a separability provision.

Section 6 established the effective date of S. 1647. It is intended to clarify Congress' intent to withdraw jurisdiction of the inferior federal court to continue in effect indefinitely any order proscribed by section 3 of the bill. As a matter of prudence, however, section 6 permits the appropriate court to dissolve such an order at a time which the court determines will cause the least interruption in the orderly activities of the public elementary or secondary schools involved, but in no event later than one year after the date of the application of the petition made for dissolution of the order. Application for dissolution of the order can be made in the appropriate court. Any court with jurisdiction and venue to hear the case is an appropriate court and would have the power to dissolve the proscribed order of another federal court. The most appropriate court, however, would be the court which originally issued the proscribed order.

VIII. Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, D.C., December 15, 1982.

Hon. John P. East,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington, D.C.

Dear Mr. Chairman: At the request of the Committee staff, and pursuant to Section 202 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared a cost estimate for S. 1647, the Neighborhood School Transportation Relief Act of 1981, as reported by the Senate Subcommittee on Separation of Powers, November 17, 1982.

The bill would bar inferior federal courts from ordering the assignment or transportation of students to a public elementary or secondary school, or require closing of any school, for the purpose of altering the racial or ethnic composition of the student body.

Based on our review, the CBO estimates that no significant costs or savings will be incurred by the federal government as a result of enactment of S. 1647. It is expected that court caseloads and judicial and executive branch activities in such cases will not substantially change as a result of this limitation in the remedies available to the courts.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin, *Director.*

MINORITY VIEWS OF SENATOR MAX BAUCUS CONCERNING S. 1647—MARCH 28, 1983

I personally am opposed to busing. I don't like busing. I think the Courts and Congress ought to avoid the use of busing as a means of addressing racial imbalance in our public schools. Furthermore, I firmly believe that Congress has a very real and important role to play in fashioning judicial remedies.

Those of us who have genuine concerns about the remedy of busing have an obligation to try to do something about it. However, we also have an obligation to legislate within the constraints placed on us by the Constitution.

I share with the sponsors of S. 1647 a common general perspective on the need to restrict busing. However, we in the Congress must be constrained in how we translate our personal feelings into responsible legislation. We must be cognizant of the proper role for the legislature and the proper role for the courts. We must be mindful of each branch's distinct function under the doctrine of the separation of powers. S. 1647, in my view, ignores the doctrine of separation of powers and represents a significant legislative encroachment on the judicial function.

The Findings

I do not believe that the Congressional findings contained in S. 1647 accurately reflect the record of the Separation of Powers Subcommittee. The Subcommittee heard from sociologists who presented sharply differing views on the impacts of busing and desegregation. Some asserted that there is substantial data to support the so-called "white flight" theory, and some questioned its validity.

Other sociologists maintained that busing and desegregation have led to lower student achievement and others told us the data leads them to just the opposite conclusion. Finally, members of Congress and citizens described the adverse impact of busing on their communities, while school board officials from Seattle, Louisville, and Little Rock testified to the benefits of desegregation to their school systems and their communities.

This conflicting testimony made it clear that there is not a clear consensus either among our finest academicians or among our community leaders on the consequences of desegregation and busing. The facts seem to indicate that the busing experience varies widely from community to community. This simply means that we are unable to draw sweeping conclusions. Many of the findings contained in S. 1647 attempt to draw such sweeping conclusions, and I therefore find them objectionable and not reflective of the record of the Subcommittee.

UNCONSTITUTIONALITY OF S. 1647

There is perhaps no issue before the Senate Judiciary Committee in the 97th Congress of greater importance than the question of whether Congress can or should attempt to overturn the constitutional decisions of the Supreme Court by simple statute. I personally believe that S. 1647 and the other "court stripping" bills being considered in the 97th Congress represent a profound assault on our Constitution and on individual liberties.

The American Bar Association has vigorously opposed such legislative efforts. The A.B.A.'s testimony in opposition to S. 1647 was presented to the Subcommittee by former A.B.A. President, Robert Meserve. His prepared remarks included the following excerpt:

> Our consistent position with respect to this issue springs from our commitment to the rule of law and our feeling as to the proper place of the federal courts in our constitutional system. The judiciary power which the Constitution lodges in those courts, ultimately for possible final decision by the Supreme Court, includes the power of constitutional review—the power to determine in a case properly brought what the rights of the parties to the suit are under the Constitution. That ruling specifically binds the parties and establishes the "rule of the case" and precedent governing or guiding lower courts in the resolution of the same or similar controversies between the same or other parties. The rule of *stare decisis* allows citizens to plan their future conduct, relying on prior determinations of applicable law.
>
> The amendment process, established in Article V of the Constitution, is the appropriate way to alter the Constitution and interpretations of it which the Supreme Court has rendered and to which it adheres. That process, which requires extraordinary majorities in Congress and among the States, gives stability to our democratic system. It is, as Justice Frankfurter stated, a "leaden-footed process," which by its very elaborateness guarantees serious reflection by all the people on the import of such constitutional changes, before the will of the majority is duly enacted. The intent of the Framers, as evidenced by Federalist numbers 10 and 78, was to establish not only a government responsive to the majority's will, but also one which avoided frequent shifts in its fundamental law by providing some shelter from transient whims of the public.
>
> We do not believe that the acknowledged absence of congressional power to bypass this amendment process by simple legislation can, or should, be filled by the expedient of couching what are legislative enactments in jurisdictional or remedial terms. That, simply put, was the basis of the ABA's latest resolution, an amalgam of constitutional and policy concerns respecting the use of jurisdictional legislation to accomplish what cannot be achieved substantively.
>
> The language of S. 1647 indicates that its purpose goes beyond questions of remedy or even of regulation of jurisdiction, and does, in fact, aim at altering the substantive

law. In Section 2(b)(3), the bill states that the assignment and transportation of students to schools "is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating *de jure,* purposeful, segregation because such segregation can be eliminated without such assignment and transportation." This contradicts holdings of the federal courts in specific cases. The bill further states that such assignment and transportation fails to account for data indicating that racial and ethnic imbalance in the schools is often the result of economic and sociological factors rather than past discrimination by public officials. As busing has not been ordered by courts in the absence of findings of *de jure* segregation, this, too, is an attack on prior legal conclusions of the federal courts in specific cases. Section 2(b)(11) states that busing has been undertaken without any constitutional basis or authority. Again, this directly contradicts a long and established series of holdings by the Supreme Court, whose province and duty it is to say what the law is, a principle declared by John Marshall in *Marbury* v. *Madison* and generally accepted.

The ABA has serious doubts as to the constitutionality of proposed legislation of this type. It is true that Congress has power to determine the jurisdiction of inferior federal courts. That power is vested in you by the express language of Article III of the Constitution and has been supported—if that were needed—in a number of Supreme Court cases. We do not doubt that as a general proposition Congress has discretion to place some issues exclusively in the inferior federal courts, exclusively in the state courts, or, concurrently in the two sets of courts. We do not doubt that Congress can prescribe the manner in which cases go to the Supreme Court. But we doubt your authority to adopt rules of decision or to make findings of fact in cases now, or in the future, before the courts, or to deny the only remedy effective to right constitutional wrongs."

While Congress has a role to perform in structuring judicial remedies, Congressional power does not include the power to totally prohibit the federal courts from utilizing remedies that are necessary to permit citizens to vindicate their constitutional rights. S. 1647 does not limit itself to the restructuring of a remedy, but rather attempts to strip the courts of a remedial power that may in some situations be a necessary remedy to address a constitutional violation.

Congressional Interference With Inherent Judicial Powers

S. 1647 attempts to remove the judicial contempt power from courts who may be attempting to enforce busing orders and requires a court to dissolve a pending busing order upon the filing of a petition by an affected school board. As a matter of constitutional law, the Congress may in some circumstances be able to withdraw lower federal court jurisdiction. However, it is an entirely different

matter for the Congress to interfere with the courts' handling of cases over which they have legitimate jurisdiction.

The section of S. 1647 that provides for the dissolution of current busing orders is blatantly unconstitutional under the Supreme Court's holding in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). The *Klein* Court found that Congress did not have the power to compel a certain decision by the Court. Under S. 1647, Congress would require a court to dissolve a busing order without any opportunity for the court to review the case. Congress' power over the lower federal courts does not include the power to order courts to handle cases in a particular fashion, but this is precisely what S. 1647 seeks to do.

A separate provision of S. 1647 removes the court's power to issue contempt orders to enforce busing orders. The contempt power is an inherent judicial power. Congress' authority to control the jurisdiction of lower federal courts clearly cannot include the authority to remove the contempt power from the courts.

These Congressional attempts to eliminate the judicial contempt power and to permit the automatic dissolution of current court orders are a blatant violation of the doctrine of separation of powers. The Separation of Powers Subcommittee is charged with the responsibility of upholding that basic principle of our Constitution. We should be working to uphold and support the principle. We should not be reporting legislation which so fundamentally undermines the separation of powers.

Impact on Remedies Other Than Busing

The majority report describes the scope of S. 1647 as narrowly defined to limit only the remedy of busing. During the hearings on S. 1647, Chairman East repeatedly described the scope of the bill as only effecting the remedy of busing. During his opening statement at the hearing on Thursday, October 1, Senator East described his bill as follows:

> Again, as a subscriber to the bill, for perspective I would like to underscore that what this bill would do would be to withdraw the jurisdiction of the lower federal courts on a very slender point, namely the power to issue orders mandating busing for the purposes of achieving racial balance. It is not designed, nor would I contend it could in any way, shape, or form be so interpreted to be more than that.
>
> In short, the jurisdiction and the power of the lower federal courts to do anything else in this area of bringing about the implementation of civil rights of all Americans, be it black, Hispanic, or whatever, would continue in its full and sweeping course. They would certainly still enjoy enormous power pertinent to the public school systems of this country.
>
> What it would do, I repeat, is to carve out a slender area of jurisdiction, namely the power to issue orders requiring compelled busing for the purposes of achieving racial balance.

The simple fact is that S. 1647 is *not* designed only to limit the court's use of the remedy of busing. S. 1647 addresses two remedies involved in school desegregation cases that have nothing to do with busing. The bill would preclude a court from ordering the reassignment of teachers and preclude a court from ordering the opening and closing of schools. These two provisions do not involve court ordered busing and, in fact, represent significant alternatives to busing.

There was no evidence before the Subcommittee that either of those remedies has been harmful. In fact, it is interesting to note that the majority report does not mention these provisions and contains no data to support the proposition that these remedies have been utilized to anyone's detriment.

During the Subcommittee's hearings, the Reagan Administration specifically requested that the legislation be altered so as not to preclude the Department of Justice from requesting a court to utilize these two specific remedies. When testifying before the Separation of Powers Committee, Assistant Attorney General Reynolds directly addressed his misgivings with this aspect of S. 1647. He stated:

> I would sound only one cautionary note. In framing legislation aimed at eliminating, or severely limiting, the use of forced busing as an available remedial tool, care should be taken not to draft the statutory prohibition so broadly that it bans as well other desegregation techniques which have not been shown to be ineffective or counterproductive in combating state imposed racial segregation of our public schools. In this regard, a legislative prohibition against inferior federal courts ordering transportation of students to obtain racial balance in the schools need not, in our view, also preclude use of other remedial techniques such as school closings in systems with excess capacity or involuntary transfers of teachers to break up state-created racially identifiable faculties.

It is one thing to restrict the remedy of busing. But it is another thing to prohibit the use of those remedies that are the very alternatives to busing that the Administration feels it will want to request in order to obviate the need for busing. The Committee should not, in my view, preclude courts from utilizing remedies that are effective and have not been shown to be harmful.

There was no evidence before the Subcommittee that justifies Congressional removal of the remedies of school openings and closings and teacher reassignment. I hope that the full Committee and the full Senate will carefully consider this lack of evidence as well as the Department of Justice's opposition to these two provisions before taking such a drastic step.

Impact on Pending Orders

S. 1647 permits all pending cases involving busing to be reopened. There are serious questions as to whether, as a matter of public policy, such a provision is advisable. This point was made by Assistant Attorney General Reynolds when he testified before the

Subcommittee. In presenting the Administration's view on this subject, he stated:

> Let me add that our present thinking is to give this approach prospective application only. We thus do not contemplate routinely reopening decrees that have proved effective in practice. The law generally recognizes a special interest in the finality of judgments, and that interest is particularly stong in the area of school desegregation. Nothing we have learned in the 10 years since *Swann* leads to the conclusion that the public would be well served by reopening wounds that have long since healed.

S. 1647 runs directly counter to this wise admonition. The Assistant Attorney General for Civil Rights and the Reagan Administration recognize the great societal harm that would be done if all current orders were dissolved or unenforceable. I share that view.

Responsible Alternatives to S. 1647

Simply, because one believes S. 1647 is unconstitutional, it does not follow that Congress is powerless to address the remedy of busing. I believe that it is appropriate for Congress to instruct the courts that busing shall only be used as a last resort after all other alternatives have failed. Furthermore, it is appropriate for Congress to instruct the courts that the remedy will only be used in those cases where the court has made very specific findings in a number of substantive areas including the health, safety, and educational impact on students. Such an approach would force the courts to limit their use of the remedy, but recognizes that Congress cannot constitutionally prohibit the remedy in those limited cases where it is the only way that constitutional rights can be vindicated.

Professor Bert Neuborne of the N.Y.U. School of Law made these points most cogently in his testimony before the Subcommittee. His prepared statement reads, in part, as follows:

> Of course, to recognize that Congress lacks power to deprive Federal courts of the ability to issue necessary remedies in constitutional cases is not to suggest that Congress may play no role in the remedial phase of a constitutional case. So long as Congressional action does not prevent a Federal court from enforcing its decision on the merits, Congress may—and should—exercise substantial authority in overseeing remedies for persons whose constitutional rights have been violated. For example, in connection with school de-segregation litigation, Congress may require a court to permit third-persons affected by a proposed remedial decree to intervene in order to assure that the Federal judge is aware of the factual implications of a given remedial decree. Alternatively, Congress could require the appointment of a guardian *ad litem* to represent the interests of affected third persons in any case in which busing or re-drawing of district lines is contemplated.
>
> Similarly, Congress may establish a hierarchy of possible remedies in constitutional cases. Thus, Congress may re-

quire a Federal judge contemplating the issuance of affirmative injunctive relief in school de-segregation cases to certify that no less drastic remedy exists capable of implementing the decision on the merits. In connection with such certification, Congress may require that specific findings of fact be made in connection with issues relevant to the necessity for and scope of the remedial decree. Moreover, although the issue is not free from doubt, Congress may well be empowered to establish the burdens of proof governing contested fact-finding pursuant to such remedial hearings. Thus an appropriate bill may:

(1) assure the participation of interested third parties during the remedial phase of a school de-segregation case;

(2) require a specific finding that no less drastic remedy exists capable of implementing the courts decision on the merits;

(3) require that specific findings of fact be made on contested issues relevant to the remedial decree; and

(4) establish the burdens of proof which govern the resolution of contested factual issues relevant to the remedial decree.

What Congress may not do is purport to give an Article III judge power to resolve a constitutional case or controversy by vesting him with subject matter jurisdiction while simultaneously removing the power to grant remedies needed to enforce his decree. It is, to say the least, hypocritical to invite minority plaintiffs to use a judicial forum which lacks power to vindicate their rights.

There is, however, a more positive role which Congress should play in the remedial phase of a school de-segregation case. Busing is resorted to by Federal trial judges because no alternative remedies exist which appear to hold out hope of remedying the constitutional violations which plaintiffs have endured. Judges, bound by tradition and appropriate self-restraint, are limited to a remedial armory which includes injunctions and compensatory damages, but little else. Congress on the other hand, is free to explore the possibility of innovative remedial devices which will make constitutional plaintiffs whole, while sparing third-persons from disproportionate cost. Unfortunately, Congress reaction to the remedial problem in school desegregation cases has tended to be negative. However, if Congress genuinely wishes to end busing, it may not do so by simply seeking to outlaw it. Rather, it must explore the existence of alternatives which will provide minority children with their full constitutional rights. The pragmatic truth is that no Federal judge would order a minority child bussed from a genuinely superior minority school to an inferior integrated one. If Congress wishes to provide an alternative to busing, let it authorize Federal judges to turn minority schools into demonstrably superior educational institutions. If we are not prepared to permit minority children to be bussed in order to attend integrated schools because it is too disruptive to third-parties, per-

haps we can compensate the minority children, not in money, but in knowledge.

Unless Congress is prepared, however, to explore innovative alternatives to busing, it may not pursue a negative course which seeks to strip Federal judges of the only remedial device which can vindicate the constitutional rights of plaintiffs who have properly invoked the subject matter jurisdiction of an Article III court.

Conclusion

I do believe that Congress has a very real and important role to play in fashioning judicial remedies. We ought to do something about the remedy of busing, but to do it in a manner that is consistent with the basic principles of our Constitution. If we do that, the Court itself will be less likely to view our action as an affront to their independence and more likely to see us as trying to work within our legitimate constitutional role.

Unfortunately, S. 1647, in my view, represents a frontal assault on the judiciary:

The bill would remove the judicial contempt power, which is an inherent judicial power.

The bill would require judges to automatically dissolve cases without an opportunity to review the case, which is a blatant violaion of the Supreme Court's holding in *United States* v. *Klein.*

The bill would not only prevent busing orders but would also prevent orders involving school openings and closing and teacher reassignments—two remedies specifically supported by the Reagan Administration.

Furthermore, there is ample evidence in the Subcommittee's hearing record to support the contention that S. 1647 is an attempt to effectively overrule *Swann* v. *Board of Education* and other related decisions of the Supreme Court of the United States. Before we take such action, we should be reminded of President Abraham Lincoln's admonition concerning the Supreme Court's Dred Scott decision:

> We think its decisions of constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this.

Members of the Judiciary Committee ought to keep these wise words in mind when they vote on S. 1647. The legislation represents an end run of the Constitutional amendment process and blatantly violates the doctrine of separation of powers. I hope each and every member of the Judiciary Committee and the Senate will carefully consider these aspects of S. 1647 before they endorse such a radical departure from the traditional American view of our three branches of government.

○